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In the

Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors with expertise in legislative jurisdiction and international law, who have an interest in the proper understanding of the presumption against extraterritoriality and the effects test. The D.C. Circuit has advanced an approach to legislative jurisdiction that, in our view, is inconsistent with long-standing principles of American law and is likely to exacerbate already a serious conflict within the lower courts on an unsettled question of law. We submit this brief to clarify the history and application of the effects test and show how that history bears upon the proper interpretation of whether Congress intended a statute to reach extraterritorial conduct. We also submit this brief because, unless corrected, the D.C. Circuit's improper use of the effects test will have far-reaching negative ramifications.

We take no position on the other issues that this case raises. We do not opine as to what Congress intended when it enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO") or wheth-

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[1] No counsel for a party authored this brief in whole or in part. No one, other than *amici* or the institution where they teach, has made a monetary contribution to the preparation and submission of this brief. Pursuant to S. Ct. Rule 37.2, *amici* gave notice of intent to file this brief to counsel of record for all parties at least ten days prior to the date of filing. Letters of consent to the filing of this brief have been lodged with the Clerk.

er that statute applies to the defendant's activities. Nor do we take a position on the underlying merits: the federal government's use of civil RICO to prevent and restrain an alleged scheme to deceive American consumers about the health risks of smoking. If the D.C. Circuit's decision was, or could be, limited to the RICO context, *amici* would not have filed this brief. But the decision is not so constrained. Because the effects test potentially captures all kinds of foreign activity, the D.C. Circuit's decision casts a pall of uncertainty over a wide range of cases involving all types of legislation.

Amici include Professor **Jeffery C. Atik**, Loyola Law School – Los Angeles; Professor **Andrea K. Bjorklund**, University of California, Davis, School of Law; Visiting Associate Professor **Gregory W. Bowman**, West Virginia University College of Law; Associate Professor **Karen Bravo**, Indiana University School of Law – Indianapolis; Professor **Lea Brilmayer**, Yale Law School; Assistant Professor **Anthony J. Colangelo**, Southern Methodist University – Dedman School of Law; Associate Professor **Paul R. Dubinsky**, Wayne State University School of Law; Professor **Mark Gibney**, University of North Carolina – Asheville; Professor **Stuart P. Green**, Rutgers University School of Law – Newark; Associate Professor **Max Huffman**, Indiana University School of Law – Indianapolis; Associate Professor and Associate Dean **Jennifer A. Kreder**, Northern Kentucky University – Chase College of Law; Professor **Robert E. Lutz**, Southwestern Law School; Associate Professor **Jeffrey A. Meyer**, Quinnipiac University School of Law; Associate

Professor **Philip M. Moremen**, Seton Hall University – Whitebread School of Diplomacy and International Relations; Professor and Vice-Dean **Austen L. Parrish**, Southwestern Law School; Professor **Michael D. Ramsey**, University of San Diego School of Law; Assistant Professor **Cassandra Burke Robertson**, Case Western Reserve University School of Law; Associate Professor **Robert D. Sloane**, Boston University School of Law; Associate Professor **Howard M. Wasserman**, Florida International University School of Law.

STATEMENT AND SUMMARY OF ARGUMENT

This case raises important and recurring issues implicating legislative jurisdiction and international law. The D.C. Circuit below failed to tackle the difficult question of whether Congress intended RICO to apply to the foreign conduct of non-nationals — an issue on which the lower courts are divided. Instead, it embraced a troubling approach that treats regulation of foreign conduct as domestic, *not* extraterritorial, regulation. The Court should grant review for at least four reasons.

First, the D.C. Circuit's opinion has added confusion to an existing three-way circuit split on the scope and application of the effects test. Some courts interpret the effects test as setting the outer limit of Congress's legislative jurisdiction. *See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (en banc). Others use the effects test as a canon of construction that overrides the presumption against extraterritoriality. *See, e.g., Environmental Defense Fund, Inc. v.*

Massey, 986 F.2d 528 (D.C. Cir. 1993). A third group of courts invokes the effects test and then applies an interest-balancing or comity analysis to decide whether to decline jurisdiction that has otherwise vested. *See, e.g., United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997). Within those three approaches, the case law also tends to reflect confusion as to what constitutes an "effect" and the magnitude and character of the effect required. These pre-existing splits would alone justify granting review.

But the court below went further and outstripped its own decision in *Massey*, a case that embraced the most far reaching of the approaches. The new D.C. Circuit rule is that once the effects test is met, Congressional intent can be presumed. Without looking at RICO's text, its purpose, or even its legislative history, the court concluded that Congress intended to regulate the foreign conduct of foreign corporations. The D.C. Circuit thus fashioned a new analysis in which the effects test serves as a substitute for, and affirmative evidence of, legislative intent. This never-before-recognized analysis makes this Court's review especially warranted.

Second, the meaning of the presumption against extraterritoriality is now in doubt. The court below construed the presumption too narrowly. It did so by designating a new category of statutes with "true extraterritorial reach" and found that the presumption against extraterritoriality applies in only those *true* cases. Pet. App. 58a. The court of appeals opined that an assertion of jurisdiction is not extraterritorial unless a statute is in-

terpreted to "reach foreign conduct with no impact on the United States." *Id.* That newly-minted method for determining whether Congress intended a law to apply to foreign persons and activities is so dramatic a departure from this Court's precedent that the departure alone also justifies granting the petition.

Third, the Court should grant *certiorari* because the D.C. Circuit's decision threatens harm to the work of both Congress and the Executive branch. Congress is affected because the presumption against extraterritoriality is a key interpretive rule that provides the backdrop against which Congress legislates. The Executive branch is affected because the extraterritorial application of law interferes with the creation of comprehensive and harmonized international regulation through state-to-state negotiation.

Lastly, this case presents an ideal vehicle for considering these important issues. Even though the effects test has been utilized since the 1940s and extraterritorial cases are increasingly common, the Court has never directly addressed the test's scope and meaning. In the past, when the Court has declined to act, circuit court decisions on the effects test have been afforded unusual weight and have taken on atypical significance. *See, e.g., Massey*, 986 F.2d at 528; *cf. United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). The Court should grant review and bring much-needed clarity to what has become a confused area of law.

ARGUMENT

The Court should grant *certiorari* to address the three-way split on the effects test's application and to affirm the vitality of the presumption against extraterritoriality. Resolving this case on the merits will avert serious harm and restore predictability to a confused area of law.

I. Conflict And Confusion Exist In The Lower Courts On The Effects Test's Application And Its Interplay With The Presumption Against Extraterritoriality.

This Court should grant review to resolve the deep conflicts that exist in the lower courts. At least three fundamentally different approaches to determining the geographic reach of federal law exist. Within each of these approaches, courts are inconsistent as to the degree and directness of the effect necessary for a statute to reach overseas conduct. If left uncorrected, the decision below will render the meaning of the effects test and the presumption against extraterritoriality even more unsettled.

A. A Three-Way Circuit Split Exists On The Application Of A Doctrine That This Court Has Never Clarified.

Courts do not agree on the proper role, meaning, or application of the effects test and whether that test overrides the presumption against extraterritoriality. Although since 1945 the effects test has dominated the extraterritoriality analysis in antitrust, securities and trademark law contexts, this Court rarely has had the opportunity to offer

guidance about its meaning.[2] The lower courts in turn have developed a patchwork of incoherent and haphazard approaches.

A three-way split prevails in the circuits on how to determine the geographic reach of federal law. The Second Circuit holds that the effects test defines the outer limit of Congress's legislative jurisdiction, leaving the question of the law's reach to a separate inquiry into Congress's intent (subject to the presumption against extraterritoriality). *See Consol. Gold Fields PLC v. Minorco S.A.*, 871 F.2d 252, 261–62 (2d Cir. 1989) (pursuing overseas conduct on the basis of "substantial effects" is an extraterritorial application of U.S. law). Courts applying the Second Circuit's approach understand extraterritoriality to be defined by the situs of the conduct rather than its effects. Although Congress may regulate foreign conduct when effects are felt in the United States, Congress must affirmatively intend to do so. *Id.; see also Steele v. Bulova Watch Co.*, 344 U.S. 280, 285–87 (1952) (finding jurisdiction based on an analysis of Congress's intent).

The First, Third, Fifth, and Seventh Circuits have included foreign comity concerns as part of the effects test in a so-called interest-balancing ap-

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[2] For the rare exception, where the test was applied but not discussed in depth, see *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 704-05 (1962) (finding the antitrust laws to apply where there were substantial effects on commerce within the United States). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (analyzing the extraterritorial reach of the Sherman Act, but not deciding the effects test's scope).

proach. *See Nippon Paper*, 109 F.3d at 8–9; *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982); *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980). Among those circuits that graft a comity analysis onto the effects test, the courts differ on how the analysis is procedurally applied. While some circuits treat comity as one factor in determining a court's jurisdiction, the Third and Seventh Circuits treat comity as a standing inquiry. *See generally* Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 297–304 (2007) (detailing the "refinement of the 'effects test'" in antitrust law and the confusion in the lower courts).

The D.C. Circuit has taken a third approach. This third approach to legislative jurisdiction finds the effects test overrides the presumption against extraterritoriality. In *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984), the D.C. Circuit held that an assertion of jurisdiction over conduct with domestic effects "is not an extraterritorial assertion of jurisdiction." *Id.* at 923. A decade later, in *Massey*, the D.C. Circuit reached the same conclusion. *Massey*, 986 F.2d at 531. In *Massey*, the court held that the presumption against extraterritoriality does not apply when foreign conduct "results in adverse effects within the United States." *Id.*

The split among the lower courts is entrenched and well known. Legal scholars have long lamented the doctrinal incoherence. *See, e.g.*, William Dodge, *Understanding the Presumption Against*

Extraterritoriality, 16 BERKELEY J. INT'L L. 85, 88 (1998) (describing alternative approaches and noting conflicts between circuits); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 638 (4th ed. 2007) (describing the "confusion for private parties and lower courts" based on the courts' different approaches to legislative jurisdiction); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law* (forthcoming 2010), *available at* ssrn.com/abstract_id=1569643, at 4–8 (describing three different approaches to "how U.S. courts should construe geoambiguous laws"). The incoherence creates incentives for forum shopping and causes unpredictable results. The resulting disarray makes it impossible for any entity operating multi-nationally to estimate litigation risk.

As testament to the confusion, one circuit — the Ninth — has wavered among all three alternatives. At times, the Ninth Circuit adheres to the presumption against extraterritoriality. *See, e.g.*, *Subafilms*, 24 F.3d at 1097 (en banc) (finding the presumption against extraterritorial regulation applies even when adverse effects are felt in the U.S.). But three-judge panels of the Ninth Circuit have also toyed with the other two approaches. *Compare Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (applying the interest-balancing approach) *with Pakootas v. Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1075 (9th Cir. 2006) (finding domestic effects in the context of the Superfund laws defeated the presumption against extraterritoriality).

Even Congress has acknowledged the confusion and circuit split. In 1982, Congress addressed the effects test when it enacted the Foreign Trade Antitrust Improvements Act. 15 U.S.C. § 6a. In the legislative history of that antitrust legislation, Congress decried the differences among lower courts "in their expression[s] of the proper test for determining whether U.S. antitrust jurisdiction over international transactions exists." H.R. Rep. No. 97–686, at 2–5 (describing six different versions of the effects test).[3] No analogous legislation exists in other contexts where the effects test is applied. So courts are tasked with determining the extraterritorial reach of federal laws on the basis of a common law scheme that this Court has rarely examined and Congress has not clarified.

B. The Effects Test's Meaning Remains Unsettled.

Not only does conflict exist as to the effects test's relationship to the presumption against extraterritoriality, but also confusion exists as to the degree and directness of effects necessary to permit U.S. law to reach overseas conduct. This confusion provides another compelling reason for granting *certiorari*.

At least three different analyses persist here too. In *Timberlane*, the leading authority for a comity-based approach, the Ninth Circuit stated

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[3] Whether Congress mitigated the problem in antitrust with the FTAIA is unclear. *See* Huffman, *supra*, 44 HOUS. L. REV. at 286 (describing how the FTAIA injected further confusion into the question of antitrust extraterritoriality).

that a "direct and substantial effect" is required. 549 F.2d at 610. That court cited district courts in California, New York and New Jersey as following the same requirement. *Id.* In contrast, the Fifth Circuit has followed a different, disjunctive formulation — "[a] restraint that directly *or* substantially affects" domestic conditions would satisfy the standard for extraterritorial application of the Sherman Act. *Industrial Inv. Dev. Corp.*, 671 F.2d at 883 (emphasis added); *see also Dominicus Americana Bohio v. Gulf & West Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979). Finally, the Second Circuit appears to have replaced "substantial" with "foreseeable," holding that since a domestic effect "was clearly a direct and foreseeable result of the conduct outside the territory of the United States," the district court should have asserted extraterritorial jurisdiction. *Consol. Gold Fields*, 871 F.2d at 262.

In addition to the inconsistent analyses, the test is difficult to apply and lacks doctrinal clarity. Predicting in any given case whether the requisite effects will be found, and their legal significance if they are found, has become impossible. *See* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1480–81, & n.140 (2008) (citing cases); *cf.* Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement,* 60 SMU L. REV. 103, 135–36 (2007) (noting the difficulty of distinguishing between direct and indirect effects). Confusion likewise exists as to whether the effect must be targeted directly against the U.S. government or whether acts that affect private citizens are sufficient. *See* Ellen S. Podgor & Daniel M. Filler, *International Criminal*

Jurisdiction in the Twenty-First Century: Rediscovery United States v. Bowman, 44 SAN DIEGO L. REV. 585, 588–89 (2007) (highlighting an often overlooked, but important, distinction between foreign conduct that "affects private citizens and those acts targeted directly against the government").

II. The D.C. Circuit Dramatically Departed From This Court's Prior Precedent.

More than serious circuit conflicts exist; the D.C. Circuit's ruling also departs from this Court's precedents in two inappropriate ways. First, the court below used the effects test to overcome the presumption against extraterritoriality. Second, the court used the test as a substitute for affirmative evidence of Congressional intent. These errors justify issuing the writ too.

A. The Holding That The Effects Test Nullifies The Presumption Against Extraterritoriality Conflicts With This Court's Precedents.

The D.C. Circuit adopted an approach that creates a gaping exception to the presumption against extraterritoriality. The Court should grant review to restore what once was settled law.

Congress has the power, within Constitutional limits, to enact a statute that regulates the conduct of non-nationals abroad. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). The critical issue is "always one of statutory construction" and whether Congress actually exercised that power. *Stegeman v. United States*, 425 F.2d 984, 986 (9th Cir. 1970) (en banc). Absent unmistakable evidence

to the contrary, the presumption is that Congress does not intend to regulate foreign activity.

This Court has never deviated from this basic tenet of statutory construction. It has often invoked the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993). That notion has led the Court to explain that a presumption against extraterritorial regulation exists. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284–85 (1949)). In "case of doubt," this Court has cautioned, lower courts must construe a statute "to be confined in its operation and effect to the territorial limits" of the United States. *N.Y. Cent. R.R. Co. v. Chisholm*, 269 U.S. 29, 32 (1925).

The presumption is not an outdated or forgotten doctrine. In recent years, this Court has said repeatedly that the presumption against extraterritoriality is a powerful one. *See, e.g., Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007) (affirming the presumption and noting that "foreign conduct is generally the domain of foreign law"); *Small v. United States*, 544 U.S. 385, 388–89 (2005) (affirming the presumption); *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (explaining that courts should avoid interpreting a statute to apply extraterritorially absent a clear contrary intent).

Instead of addressing this binding authority, the D.C. Circuit circumvented it by changing the very definition of extraterritoriality. Pet. App. 58a. According to the court of appeals, extraterritorial

jurisdiction is not implicated if the statute seeks to remedy domestic effects. *Id.* ("[R]egulation of foreign conduct meeting this 'effects' test is 'not an extraterritorial assertion of jurisdiction.'"). *Amici* agree with petitioner that this reading is incompatible with the ordinary meaning of the word "extraterritorial," and how both courts and commentators use the term. *See* Pet. 13. But the D.C. Circuit's reading also leads to an especially peculiar result. Treating the regulation of foreign activity as "domestic regulation" whenever an adverse impact is felt in the United States not only eviscerates the presumption against extraterritoriality but create a presumption in favor of universal jurisdiction.

Properly understood, the effects test was never intended as a canon of statutory construction that overcomes the presumption against extraterritoriality. Instead, the test sets the outer boundary of permissible Congressional action under customary international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (explaining that a "state has jurisdiction to prescribe" when foreign conduct "is intended to have substantial effect[s] within its territory"); S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 16 (Sept. 7) (permitting states to exercise legislative jurisdiction based on domestic effects). Absent an alternative basis for jurisdiction, international law prohibits the U.S. from regulating the foreign conduct of non-nationals that has no effect on the United States. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298–305 (6th ed. 2003) (setting out bases of jurisdiction under international law); *cf.* Lea Brilmayer & Charles

Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (describing the Constitutional limits on Congress's power to enact extraterritorial legislation).

The effects test thus serves an important purpose, but not the one the D.C. Circuit ascribed to it. If a substantial adverse effect in the United States exists, a court need not account for a second canon of statutory construction that is "wholly independent" of the presumption against extraterritoriality. *Aramco*, 499 U.S. at 264. That canon is: "An act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (providing that states normally refrain from prescribing laws that govern activities connected with another state "when the exercise of such jurisdiction is unreasonable."). The "practice of using international law to limit the extraterritorial reach of statutes" is not a new approach, but "firmly established in [this Court's] jurisprudence." *Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting); *see also Empagran*, 542 U.S. at 164 (courts "must assume" that "Congress ordinarily seeks to follow" "principles of customary international law").

Allowing the effects test to reverse the presumption against extraterritoriality — rather than to set the outer limits of Congress's legislative jurisdiction — would lead to a perverse result. A state's exercise of jurisdiction based on effects, ra-

ther than conduct, is highly contentious. *See* BORN, INT'L CIVIL LITIGATION, *supra*, at 648–49 (describing the "considerable friction" and "foreign resistance" in the antitrust context). It has led to diplomatic protests, blocking and claw-back legislation, the withdrawal of foreign investment, and other forms of retaliation. *See generally* Parrish, *supra*, 61 VAND. L. REV. at 1492–93 nn.192–96 (listing authorities); Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 505–06 (1998) (describing foreign responses). Foreign governments file *amicus* briefs because of concerns over courts expansively interpreting the reach of American law.[4] In short, exercising jurisdiction on the basis of effects nearly guarantees the very "clash" that Congress usually seeks to avoid. *Aramco*, 499 U.S. at 259. But if the effects test is applied as the D.C. Circuit commands, foreign interests would never be accounted for. The effects test would render the presumption impotent at the very moment it is needed most.

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[4] *See, e.g.*, Brief for the Republic of France as *Amicus Curiae* in Support of Respondents, *Morrison v. Nat'l Australia Bank*, No. 08-1192; Brief of the Government of Australia as *Amicus Curiae* in Support Defendants-Appellees, *Morrison v. Nat'l Australia Bank*, No. 08-1192; Brief for the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents, *Morrison v. Nat'l Australia Bank*, No. 08-1192; *see also* Huffman, *supra*, 60 SMU L. REV. at 104 n.6.

B. A Background Interpretative Principle May Not Substitute For An Inquiry Into Congressional Intent.

Even if the effects test could render the presumption against extraterritoriality inapplicable, the D.C. Circuit still erred. Any analysis of a statute's reach begins with an inquiry into legislative intent. The D.C. Circuit, however, jettisoned that inquiry by assuming that once an effect is proven, Congress necessarily intended to regulate the foreign conduct. Pet. App. 58a–60a. Using a canon of construction as affirmative evidence of intent is so at odds with this Court's precedents that this error also warrants review.

The decision below rests on the D.C. Circuit's view that it "need not decide" whether RICO applies extraterritorially "because the district court found BATCo liable on the theory that its conduct had substantial domestic effects." Pet. App. 58a. Instead of ascertaining legislative intent, the D.C. Circuit satisfied itself that it "need decide only whether the district court erred in applying the effects test – which asks whether conduct has a substantial, direct, and foreseeable effect within the United States." Pet. App. 59a–60a. The court did not look at the statute's text, the overall statutory scheme, the legislative purpose or history, or any other benchmark for ascertaining what Congress intended. *Id.* The court of appeals assumed that Congress meant RICO to apply abroad once an effect was found.

Contrary to what the decision below held, however, background interpretative principles are nev-

er a substitute for examining the text and purpose of the statute. Presumptions give way in the face of evidence that Congress intended something different. *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 120–21 (2005) (noting presumption is overcome by clear statement); *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (finding the presumption overcome when a contrary intent appeared). Even when a substantial, direct, adverse effect is felt in the United States, Congress is not required to regulate the activity. *See Subafilms*, 24 F.3d at 1097 (holding that the Copyright Act did not apply to foreign conduct even if adverse effects were felt in the United States). Disagreement may exist as to whether intent to regulate extraterritorially must appear as a clear statement in the statute's text, or whether that intent can be inferred from the statute's purpose and legislative history. *See Aramco*, 499 U.S. at 250–51 (discerning intent with reference to similarly-phrased legislation); *Foley Bros.*, 336 U.S. at 286 (examining the overall statutory scheme and legislative history). But until the D.C. Circuit's decision, no authority permitted a court to dispense altogether with discerning legislative intent.

The upshot is the D.C. Circuit's decision will sow further confusion in the lower courts. Following the D.C. Circuit's reasoning, a court may use the effects test not only to create a presumption *in favor of* extraterritoriality, but as *affirmative evidence* of legislative intent. That is a startling proposition that encourages courts to take on an impermissible legislative function. The prestige of the D.C. Circuit and the dearth of authority that has

addressed the effects test in detail guarantees the decision below will breed mischief for years to come. The Court should grant review to restore stability.

C. Congressional Silence in 1970 is not Evidence of Intent to Regulate Extraterritorially.

Review is also warranted because of another fundamental problem underlying the D.C. Circuit's approach. Even if the effects test can be understood today to reverse the presumption against extraterritoriality, no such understanding existed when Congress enacted RICO. *See American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 252 (1992) (noting that Congress is presumptively aware of the backdrop of existing law when it legislates). The failure of the lower court to consider Congress's intent at the time the statute was enacted also justifies review.

At the time RICO was enacted, it would have been stunning to suggest that courts could presume Congress to have regulated foreign conduct whenever that conduct had a domestic effect. In cases contemporaneous with the enactment of RICO, courts were closely reviewing statutory language and history for indicia of Congressional intent to legislate extraterritorially. *See, e.g.*, *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206–08 (2d Cir. 1968) (Securities and Exchange Act). And the debates in the legal academy were over the extent to which international law permitted regulation of foreign conduct. Isaac N.P. Stokes, *Limits Imposed By International Law on Regulation of Extraterritorial Commercial Activity*, 64 AM. SOC'Y INT'L L. PROC.

135, 135–40 (1970). Near that time, other nations asserted that the effects test was inconsistent with international law. *See, e.g.*, Brief for United Kingdom as *Amicus Curiae* Supporting Appellant, *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (1979), *reprinted in* 50 BRIT. Y.B. INT'L L. 352, 354–55 (1979) (arguing "the 'effects' test is inconsistent with international law," particularly in penal matters); *cf.* BORN, INT'L CIVIL LITIGATION, *supra*, at 649 (explaining that "diplomatic protests" to U.S. extraterritorial laws were commonplace in the 1970s and 1980s).

More specifically, no reason exists to believe that Congress assumed a court would read a criminal statute automatically to apply abroad. The United States had "rarely sought to prosecute for crimes committed outside its territorial jurisdiction." Note, *Extraterritorial Jurisdiction — Criminal Law*, 13 HARV. INT'L L.J. 347 (1972); *see also* Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Law Approach*, 70 YALE L.J. 259, 266–68 (1960) (describing the prohibition against extraterritorial enforcement of penal laws). In 1970, the National Commission on Reform of Federal Criminal Laws reported that "the issue of the extraterritorial application of the federal criminal law is one which does not arise frequently." NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 21 (1971). And when legislation was proposed to obviate the need for courts to ascertain the extraterritorial implications of federal criminal law legislation, jurisdiction over activity having substantial effects in the United States

was notably absent. Criminal Justice Reform Act of 1975, S.1, 94th Cong., 1st Sess. § 204 (1975).

That Congress in the 1970s would not expect courts to presume its legislation applied abroad is not surprising. At the time Congress enacted RICO, courts had "grant[ed] extraterritorial relief under 'market statutes,' like the antitrust and securities laws," but had "consistently den[ied] it under 'non-market statutes." Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598, 601, 639–41 (1990) (explaining how courts have denied extraterritorial application to nonmarket statutes). And RICO was enacted also long before the decisions in *Massey* and *Laker Airways* that purportedly overturned the presumption against extraterritoriality.[5]

III. Serious Harm Can Result If The Circuit Splits And The Confusion That Exists Below Are Not Resolved.

The D.C. Circuit's approach to legislative jurisdiction will have far-reaching consequences if left to stand. The presumption against extraterritoriality

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[5] When Congress intends a statute to apply to foreign conduct it has no difficulty speaking clearly. *See, e.g.*, 18 U.S.C. § 470 (prohibiting the counterfeiting of U.S. securities anywhere "outside the United States"); 18 U.S.C. § 2251 (prohibiting creating visual depiction of child pornography in foreign countries if intended or known to be transmitted to the United States); 21 U.S.C. § 959 (prohibiting manufacture or distribution of controlled substances and stating that "this section is intended to reach acts of manufacture and distribution outside the territorial jurisdiction of the United States").

is important. Courts look to Congress for guidance, rather than extend U.S. law blindly, for a number of pragmatic reasons.

First, the presumption against extraterritoriality serves as a canon of construction that promotes consistency and aids in the proper implementation of legislative purpose. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation,* 67 N.Y.U. L. REV. 921, 921–24, 941–50 (1992) (arguing that presumptions can aid in giving effect to legislative purpose). Congress must "be able to legislative against a background of clear interpretative rules, so that it may know the effect of the language it adopts." *Finley v. United* States, 490 U.S. 545, 556 (1989). In the jurisdictional context, predictability and simplicity are particularly important. *Hertz Corp. v. Friend,* No. 08–1107, 2010 WL 605601, Slip Op. 15–16 (U.S. Feb. 23, 2010).

Second, the presumption "serves to protect against unintended clashes between our laws and those of other nations." *Aramco,* 499 U.S. at 248; *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (noting the "desire to avoid conflict with the laws of other nations"). Applying American laws to foreign conduct or events can be "an interference with the authority of another sovereign, contrary to the comity of nations." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). At the very least, extraterritorial laws are controversial and can lead to the impression that the United States is imposing its values worldwide. *Microsoft,* 550 U.S. at 454 (explaining the presumption that U.S. law "does not rule the world"); *Em-*

pagran, 542 U.S. at 165 (expressing concern over imposing U.S. regulations on other countries).

Other nations are rightly concerned over expansive interpretations of American law because extraterritorial laws are inherently undemocratic. Extraterritorial laws force foreigners abroad to bear the costs of U.S. regulation, even though they have no vote and little formal ability to influence domestic political processes. Parrish, *supra*, 61 VAND. L. REV. at 1484; *see also* Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 305 (1996) (explaining why extraterritorial laws are undemocratic).[6] And the reciprocal concern for U.S. citizens suffering foreign regulation is well understood. *See, e.g.*, *Small*, 544 U.S. at 389 (listing economic and speech crimes).

Third, the presumption embodies judicial deference and reflects separation-of-powers concerns. Because of the sensitive nature of foreign affairs, the presumption allows courts wisely to "leave[] to Congress's informed judgment" the decision whether a law reaches foreign activity. *Microsoft*, 550 U.S. at 442. An argument that a statute should be given an expansive foreign reach must "be directed to the Congress rather than to [the Court]," because

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[6] In a democracy, those whose conduct is to be controlled by a particular law must have some voice in determining the law's substance. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed.").

it is Congress that "'alone has the facilities necessary to make . . . important policy decision[s]'" that could affect foreign relations. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963) (quoting *Benz v. Compania Naviera Hildago*, 353 U.S. 138, 147 (1957)); *see also Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (the "Judiciary has neither aptitude, facilities nor responsibility" for decisions of this nature). When the Court enters the thicket of international relations — without clear direction from Congress — it runs the risk of unnecessarily upsetting foreign affairs.

The presumption also reflects deference to the Executive branch, providing the Executive the space to negotiate bilateral or multilateral treaties to address activity that has transboundary impact. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2005) (noting in the Alien Tort Statute context the need to be "particularly wary of impinging on the discretion of the Legislative and Executive branches"). Using the effects test broadly to sanction extraterritorial jurisdiction can undermine the implementation of harmonized international regulation. *See* RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 6 (1964) (excessive extraterritorial jurisdiction "invites retaliation, engenders distrust, and undermines those actual and potential claims of international law to make stable the relations among the entire community of states.").[7] It is no answer to

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[7] Although some scholars have suggested that extraterritorial regulation can provoke international agreement by creating

suggest that the Justice Department accommodated that concern in bringing this suit against petitioner. The impacts of the decision below reach far beyond the litigation in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted.

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international discord, the theory has not played out in practice. *See* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 871-72 (2009). As one example, while the United States began applying its antitrust laws extraterritorially in the 1940s, cooperation in the form of a multilateral competition treaty is still out of reach. *See* Andrew T. Guzman, *Is International Antitrust Impossible?*, 73 N.Y.U. L. REV. 1501, 1504 (1998) (describing the difficulty in reaching international agreement).